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Supreme Court of the United States

OCTOBER TERM, 1947

No. 47 95

C. M. TINGLE, ET AL.,

Petitioners,

versus

ANDERSON-TULLY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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LIST OF AUTHORITIES CITED.

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PETITION.

MAY IT PLEASE THE COURT:

Petitioners, C. M. Tingle, O. M. Chance and P. H. Sanders, respectfully pray that a writ of certiorari issue to review the Judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in this cause on February 20, 1948 (rehearing denied March 19, 1948), reversing the Judgment of the District Court of the United

States for the Western Division of the Southern District of Mississippi.

STATEMENT OF MATTER INVOLVED.

The title to approximately 2,000 acres of accretions bordering on the Mississippi River and lying wholly within the State of Mississippi is in controversy.

The learned District Court (71 Fed. Supp. 995) decreed title in Petitioners based on the mixed factual finding and legal conclusion that Petitioners' original lands on the Mississippi River, as patented from the Government, lay south of the mouth of the Yazoo River, and these lands then had and continued to have as their western terminus and actual boundary the thalweg of the Mississippi River, the shifting boundary then and now dividing the States of Mississippi and Louisiana. The learned United States Circuit Court of Appeals for the Fifth Circuit reversed (166 Fed. 2d 224); and, in so reversing, the Court of Appeals concluded that the thalweg of the Yazoo River should be substituted as the western terminus and boundary of Petitioners' riparian proprietorship and title.

An important rule of property of Mississippi is here involved. Petitioners' rights and title to and on the Mississippi River and to the thread of that stream have been nullified and their lands and rights on the Mississippi River decreed to Respondent, though the accretions in controversy, under the laws of Mississippi, fall within the

original sphere of ownership derived by Petitioners through their predecessors in title based on patents from the Government.

JURISDICTION TO REVIEW.

Because of diversity of citizenship and the amount involved, Respondent availed of its right to remove this cause, (instituted by Petitioners as Plaintiffs) from the Circuit Court of Warren County, Mississippi, to the United States District Court for the Southern District of Mississippi. From an adverse decision by said District Court, Respondent appealed to the United States Circuit Court of Appeals for the Fifth Circuit, where the Judgment of said District Court was reversed with directions. Now Petitioners respectfully invoke the jurisdiction of this Honorable Court under U. S. C. A., Title 28, Section 347; Revised Rules of the Supreme Court of the United States, Rule 38, Section 5, Subdivision (b).

THE QUESTIONS PRESENTED.

1st: Since the learned Circuit Court of Appeals itself factually found, with reference to the area in controversy, that Petitioners' lots "extended below the mouth of the Yazoo and were bounded westwardly by the Mississippi", and then said Court of Appeals legally concluded that: "The respective parties through their predecessors acquired *actual title,* as riparian owners, to the bed of the

Mississippi as far as the State line of Louisiana opposite their respective original lots. *This boundary line was and continued to be the thread of the stream* (meaning the thread of the Mississippi River)"—then how was this title thus acquired and Petitioners' ownership to this State line lost to Petitioners due to the later formation of accretions on the very part of the bed of the Mississippi River to which said Court of Appeals found Petitioners possessed title?

2nd: Since the said Court of Appeals expressly found it to be the law of Mississippi that: "The alluvion deposited on the bed so owned by plaintiffs (Petitioners here) was the property of the plaintiffs as owners of their part of the bed though under water, and the fact that it appeared above water attached to defendant's land did not make it defendant's land"—and since the accretions in controversy were within the sphere of the actual title and ownership of Petitioners and south of and beyond the lines of riparian ownership of Respondent, how could any title or right thereto conceivably be vested in or conferred upon the Respondent to the exclusion of the riparian proprietorship of Petitioners?

3rd: Could the physical formation of these accretions (above water land *additions*) within the calls of the actual original title and ownership of Petitioners serve to deprive Petitioners of their boundary to and on the Mississippi River, the very stream to which their original rights vested and ownership extended, simply because this physical formation resulted in a prolongation (within the overall boundary of Petitioners) of an interior stream, the

Yazoo River, across (wholly within) the sphere of ownership of Petitioners?

4th: Should not, under the rules of property and law enunciated by the Supreme Court of Mississippi, the opinion (R. P. 175-181) and the Conclusions (R. P. 182-187) of the learned District Court be reinstated?

5th: Should not the opinion and order entered thereon by said Court of Appeals be reversed due to conflict with the applicable Mississippi decisions and rules of property on this important question governing titles possessed by Mississippi riparian owners of uplands?

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI.

1st: The Court of Appeals, it is respectfully submitted, decided an important question of local law in a manner which conflicts with the decisions of the Supreme Court of Mississippi involving rules of property and absolute ownership by riparian proprietors within the State of Mississippi and on the Mississippi River and opposite their uplands to the bed of that stream with right to follow, as the western boundary of their original ownership, the shifting center or thalweg of that River, which line constitutes the shifting boundary between the States of Louisiana and Mississippi.

2nd: The decision deprives Petitioners of valuable properties and of access to the Mississippi River, the center of

which River was and continued to be the western boundary always opposite and west of Petitioners' original lands.

3rd: Had not the accretions formed, then Petitioners would still be owners on the Mississippi River with title to the State line. The prevailing opinion is anomalous in its conclusion that accretions to and over one's lands limit rather than augment title thereto.

4th: The Supreme Court of Mississippi has expressly held that owners of originals lands bordering on the Mississippi River must extend their ownership to the State line *laterally*. Thereby ownership became and is certain and fixed, subject to extension by accretions and loss by erosions, always following, between lateral lines, the shifting thalweg of the Mississippi River. The decision standing ousts Petitioners of such ownership and permits Respondent to extend its ownership to the State line vertically, lengthwise and perpendicularly.

5th: Under the laws of Mississippi, having regard even to islands in the Mississippi River, it is immaterial where or how the accretions commenced or continued. The criterion, the governing and established rule of property, is that when such accretions appear on and within the calls of ownership of the next riparian proprietor (the coterminous neighboring land owner on the River), though over land originally under water, such accretions belong to the owner of the bed of the stream upon which they appear. This rule of law and of property, certain and implicit in all the governing and applicable decisions of

the Supreme Court of Mississippi, was not, in the presently prevailing opinion, given due or controlling regard.

Wherefore, Petitioners respectfully pray that a writ of certiorari be issued by this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, sitting at New Orleans, Louisiana, commanding that Court to certify to and send to this Court, for its review and determination, on a day to be designated, the record and cause on the docket of said Court of Appeals numbered 12,115 and there styled "Anderson-Tully Company, Appellant, vs. C. M. Tingle, et al., Appellees", and that such Judgment of said Circuit Court of Appeals and any Judgment which may be based thereon by the District Court for the Southern District of Mississippi be reviewed by this Honorable Court; and that Petitioners may have such other and further relief in the premises as to this Honorable Court appears just.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. THE OPINIONS OF THE COURT BELOW.

Under date of May 13, 1947, the United States District Judge for the Southern District of Mississippi filed his opinion herein (R. 175-181), along with which opinion said District Judge filed separate Findings of Fact (R. 182-185) and Conclusions of Law (R. 186-187.) The Opinion of said District Judge is reported, 71 Fed. Sup. 995.

The opinon of the United States Circuit Court of Appeals rendered February 20, 1948, with rehearing denied March 19, 1948, is appended as a part of the certified record and is reported, 166 Fed. 2d 224.

II. THE JURISDICTION INVOKED.

Statement of the jurisdiction invoked appears in the foregoing Petition. Reliance is had upon U. S. Code, Title 28, Section 347; Revised Rules of this Honorable Court, Rule 38, Section 5, Subsection (b).

III. STATEMENT OF THE CASE.

Petitoners here, the Plaintiffs in the District Court and the Appellees before said Court of Appeals, will hereinafter be referred to as "Plaintiffs". The Respondent here was Defendant in the District Court and the Appellant before said Court of Appeals, and will herein be referred to as "Defendant".

No consequential dispute exists as to the facts. As stipulated, the Defendant owns Sections 1, 2 and 3, Township 16, Range 2, Choctaw District in Warren County, Mississippi. Also, as stipulated, the Plaintiffs own all of Section 1 (excepting Lot 1 thereof), Sections 2 and 3, Township 16, Range 2, District West of Pearl River, in said County.

The maps presented of the area reconstructed the conditions at the time of the Government Land Office Survey accurately disclosing the riparian proprietorship at the time the respective litigants, through their respective predecessors in title, received patents from the Government. These patents disclosed separate ownership of these lands by various individuals (R. 165). After the entire ownership was later assembled in the litigants, it is found that the northernmost portion of Plaintiffs' lands was separated from the Defendant's holdings by the Yazoo River at its mouth. Otherwise, the original riparian proprietorship of both litigants was on the Mississippi River. Therefore, as the maps in evidence show, which fact is concurred in by both the District Court and said Court of Appeals, Sections 2 and 3 of Plaintiffs' original lands were on and riparian to the Mississippi River and consequently were bounded westwardly by the line then and now dividing the States of Mississippi and Louisiana.

The District Judge located, as abundantly sustained by the evidence, the point of intersection between the litigants at the mouth of the Yazoo River (being the bank line of the Mississippi River extended from Defendant's holdings to Plaintiffs' holdings), which point was readily

determined and is easily observable today from the maps presented. This was the point where the Choctaw District, on the Southeast, and the District West of Pearl River, on the Northwest, both contiguous to the Yazoo River, became and were riparian to the Mississippi River at the time of the Government Land Office Surveys.

This controversy arises only as to that portion of the accretions which formed over the area opposite the lots of Plaintiffs which were originally on and riparian to the Mississippi River and south of the mouth of the Yazoo River, which lots had as their western boundary the line dividing the States of Louisiana and Mississippi. The Court of Appeals found, as aforesaid, that the southerly lots of Plaintiffs' predecessors in title "extended below the mouth of the Yazoo and were bounded westwardly by the Missssippi". The testimony (R. 64, R. 80, R. 83-84, R. 101, R. 103 and R. 126), referring to Sections 2 and 3 of Plaintiffs' original riparian proprietorship on the Mississippi River, abundantly supports this finding. The mass of accretions northerly of the lateral line dividing Plaintiffs' and Defendant's original riparian ownership on the Mississippi River concededly belongs to Defendant and title thereto was by the District Judge confirmed in the Defendant (R. 190).

In the course of years accretions formed in the bed of the Mississippi River east of the center, or thalweg, of that stream. These accretions first physically attached themselves to Defendant's original lands and then extended southwardly in front of and to the west of Plaintiffs' lands and between Plaintiffs' original lands and the State line.

As these accretions formed and progressed, the physical mouth of the Yazoo River at its entry into the Mississippi River likewise and necessarily progressed southerly and easterly until the construction and opening of the Yazoo Diversion Canal (an admitted artificial and man-made avulsion) in the year of 1903. At the time of this artificial avulsion in 1903 a considerable portion of Plaintiffs' lands in Section 3, West of Pearl River, were, as the maps of 1908 disclosed, even then riparian to the Mississippi River. This fact was developed from the testimony of Mr. Richardson, largely through questions propounded by the Court (R. 77).

The District Court factually (Fact Finding No. 10) declared:

> "10. Accretions that appeared over the land in controversy, although under water at times, was within the calls of ownership (the riparian title) of Plaintiffs derived through their predecessors in title; that title by adverse possession in Defendant was not proven; that the westerly terminus of this land was, at the time of the Government Land Office Surveys, and has consequently always remained, under the facts of record, the thalweg of the Mississippi River; *that this westerly boundary of Plaintiffs' riparian ownership and title on the Mississippi River was not limited, and the Defendant's title and riparian ownership was not enlarged or augmented, by the later intervening thalweg of the Yazoo River.*" (R. 185.)

With the italicized portion above quoted the Court of Appeals disagreed. Otherwise, we submit, said Court of Appeals expressly or by necessary implication concurred

in all of the conclusions, factually and legally, of the learned District Judge, which factual conclusions are abundantly supported by the record and which legal conclusions were dictated by adherence to the rules of property of Mississippi.

We emphasize that originally the area in controversy was within the calls of Plaintiffs' title and riparian ownership on the Mississippi River; that the western boundary of this ownership was the center, or thalweg, of the Mississippi River, i. e., the State line; that the Yazoo River later, in its prolongation, crossed through Plaintiffs' lands, wholly within the original boundaries owned by Plaintiffs—between Plaintiffs' original riparian lots on the east and the center of the Mississippi River marking on the west the terminus, or boundary line, of these original lots.

The District Court held Defendant to its original boundaries—those received by its predecessors through patents from the Government—and recognized and confirmed Plaintiffs in their boundaries likewise derived through patents from the Government. Both litigants by the District Court were respectively confirmed in the title to an appreciable area of accretions.

The Court of Appeals, through its decision, substituted the center, or thalweg, of the Yazoo River as the western boundary of Plaintiffs' ownership and nullified the original riparian rights and title Plaintiffs possessed on the Mississippi River and to the center or thalweg of the Mississippi River. Further, the decision of the Court of Ap-

peals results to confirm in Defendant title to an area far south of and beyond the lines of Defendant's original ownership, which area is upon and over that portion of the former and present bed of the Mississippi River which, it must be conceded, Plaintiffs, through their predecessors, originally owned.

The pertinent facts are ably summarized in the opinions of both said District Court and said Court of Appeals. Additionally, the facts necessary to the decision here are cogently set forth in the Findings of the District Judge (R. 182-185). Basically for decision is the determination, under the prevailing common law rules of property in Mississippi, whether the prolongation of the Yazoo River wholly within the original boundaries and calls of Plaintiffs' title should result to deprive Plaintiffs of title to the Mississippi-Louisiana State line and their ownership and rights on the Mississippi River, concomitantly to the enlargement of the record title and profit of the Defendant.

IV. SPECIFICATION OF ERRORS.

Plaintiffs respectfully submit that the learned Court of Appeals erred:

1st. In not affirming the Judgment of the District Court;

2nd. In reversing the Judgment of the District Court;

3rd. In incorrectly applying the laws, constituting rules of property, of the State of Mississippi;

4th. In substituting the Yazoo River for the Mississippi River as the western boundary of Plaintiffs' ownership; and

5th. In conferring upon Defendant and confirming in the Defendant title to property beyond the confines and boundaries of Defendant's record ownership, which property, as to alluvion in controversy, falls within the calls of plaintiffs' title and riparian proprietorship on the Mississippi River.

V. ARGUMENT.

1. POINT SUMMARY.

It is proposed to show, beyond cavil, that under the laws of Mississippi:

1. Since the admittance of Mississippi as a State in 1817, owners of lands in said State bordering on the Mississippi River, above the ebb and flow of the tide, possess absolute title to the center or thread of the Mississippi River (the Louisiana-Mississippi State line), necessarily including actual ownership of the bed of that stream, subject to the public rights of free and untrammelled navigation.

2. That each such riparian proprietor on the Mississippi River, vested with title to the bed of that stream to its shifting center, is entitled to all deposits of alluvion forming over that bed with the continuing right to follow, as the western boundary of that riparian proprietorship,

the center, or thalweg, of that stream opposite (between lateral lines) the original lots of such riparian owner.

3. That, under the rule of property prevailing in Mississippi, where or how the accretions commenced or continued is immaterial. The right of one owner of uplands to follow and appropriate such deposits ceases when the formation passes laterally the line of the riparian, neighboring owner.

4. "Accretion cases" in Mississippi are controlled by the fact that the deposits of alluvion appear, no matter how attached (whether an island or otherwise), over land within the title, or over the bed of the stream, of the riparian landowner. Therefore, the streams, water courses, declivities or topography within that title, within the confines of the overall and true boundary, do not change or affect boundaries when such overall and original boundary is extant.

5. That additions by accretions over one's Mississippi uplands do not limit or curtail the title thereto when these accretions appear or form within the boundaries of the riparian proprietorship; and the physical changes wrought by the appearance or existence of an interior stream, within the original and continuing overall boundaries, does not limit the title of the original owner, nor do such physical changes serve to increase or augment the riparian ownership of the coterminous neighbor beyond lateral lines, based on such neighbor's original ownership of the shore.

2. THE ISSUE FOR SOLUTION.

Plaintiffs, being original owners through their predecessors in chain of title from the Government to and on the Mississippi River as to the area in controversy and possessing the shifting State line now and always opposite their original bank lines as their western boundary, was the Court of Appeals correct in concluding that the District Court erred in determining that "this westerly boundary of plaintiffs' riparian ownership and title on the Mississippi River was not limited, and defendant's title and riparian ownership was not enlarged or augmented, by the later intervening thalweg of the Yazoo River" (see opinion of Court of Appeals—Finding 10 of District Court, R. 185)?

3. THE LAW GOVERNING.

For brevity, we desist from copious quotations of the authorities.

This Honorable Court, through the process of certiorari, twenty-five years ago reviewed and, reversing the Court of Appeals, enforced the common law rule of property prevailing in Mississippi as to riparian ownership on the Mississippi River. We refer to and quote from the opinion delivered, without any dissent, by Mr. Justice Kenna in the case of *Archer v. Greenville Sand & Gravel Co.*, 233 U. S. 60, 34 Sup. Ct. 567, 58 L. Ed. 850:

> "We are therefore brought to the second proposition, Is plaintiff the owner of the sand and the gravel in the bed of the river?
>
> "The law of Mississippi is an element in the case. It first found elaborate discussion and decision in

Morgan v. Reading, 3 Smedes & M. 366, and it was held that the common law was adopted for the government of the Mississippi territory, and that the line of the territory was the middle of the Mississippi river, and that it hence followed that the rights of riparian owners on the east shore must be determined in the state of Mississippi by the common law, and that it was a principle of that law 'that he who owns the bank, owns to the middle of the river, subject to the easement of navigation.' 3 Kent, Com. 5th ed. 427, and notes were cited.

"The case involved the right of the owner of the bank of the river to charge for mooring purposes on the river above low water mark. The right was sustained upon the principle which we have stated above.

"The same principle was announced in the Magnolia v. Marshall, 39 Miss. 109. The case was said by the court to be identical in its facts with Morgan v. Reading. The opinion is too long to review or to quote from at any length. It left no case or authority unreviewed, nor any consideration untouched, and carefully distinguished the public and private interest in the Mississippi river, the court saying: 'There is therefore no inconsistency, but, on the contrary, as before suggested, perfect harmony between the jus privatum of riparian ownership in public fresh-water streams, to the middle of the river, and the jus publicum of free navigation thereof. The soil is granted to the riparian proprietor, subject to this public easement.' And, again, in criticism of what the court considered an untenable view expressed by the court of another state, it said: 'This general doctrine is as old as the Year-books, that, prima facie, every proprietor on each bank of a river is entitled to the land covered

with water to the middle of the stream.' This being declared to be the law of the state, judgment was entered for charges for the use by the Magnolia of a landing on the river.

"* * *The elaborate reasoning and research of the opinion were directed to demonstrate that under the common law of the state, riparian ownership extends ad filum, and, as a consequence, embraces the right to charge for the use of the water between high and low water marks for landing purposes, although not for purposes of transit. The case is cited as having that purport in 3 Kent Com. 14th ed. *427, where the doctrine of riparian rights as they obtain in the states of the Union is considered and the cases collected. In the sixth edition of Kent the Magnolia Case is commended as 'a frank and manly support of the binding force of the common law, on which American jurisprudence essentially rests'. See also Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548, for a discussion by this court of riparian rights.

"The Morgan and Magnolia Cases were cited in New Orleans, M. & C. R. Co. v. Frederic, 46 Miss. 1, 9, 10, to sustain 'the right of the owner of the land on the bank of the river to the thread of the stream, subject only to a right of passage thereon as a highway when the stream admits it.'

"It is further urged that the argument in the Morgan Case 'in support of the common-law doctrine as to the ebb and flow of the tide constituting a navigable stream is in direct opposition and antagonism to the reasoning and opinion of this court in the frequently cited and approved case of The Genessee Chief, 12 How. 443, 13 L. Ed. 1058, decided in 1851,

nine years before the opinion of the state court was handed down.' Other cases are also cited in which it is decided that riparian rights pertain to the bank, and distinguished, as it is asserted, between rights admittedly riparian and rights of ownership of or to the bed of the river. We need not enter into a discussion of those cases, or assign their exact authority. This court has decided that it is a question of local law whether the title to the beds of the navigable rivers of the United States is in the state in which the rivers are situated or in the owners of the land bordering upon such rivers. Packer v. Bird, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 57 L. ed. 1063, 33 Sup. Ct. Rep. 667; Kaukauna Water Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; St. Louis v. Rutz, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337; Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Jones v. Soulard, 24 How. 41, 16 L. ed. 604."

Then in the controlling case of *Smith v. Leavenworth*, 57 So. 803, 101 Miss. 238 (hereinafter also referred to), the Supreme Court of Mississippi cited and followed the adjudication by this Honorable Court in *Jefferson v. East Omaha Land Co.*, 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 878. There, this Honorable Court, through Mr. Justice Blanchford, declared:

"It is distinctly alleged in the bill that the new land is an accretion to that originally purchased by the patentee from the United States. The rule of law applicable to such a state of facts is thus stated by

this court in New Orleans v. United States, 35 U. S. 10 Pet. 662, 717 (9:573,594): 'The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold *by the same boundary,* including the accumulated soil. *No other rule can be applied on just principles.* Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain.' And in Banks v. Ogden, 69 U. S. 2 Wall. 57, 67 (17:818,821), it is said: 'The rule governing additions made to land bounded by a river, lake or sea, has been much discussed and variously settled by usage and by positive law. Almost all jurists and legislators, however, both ancient and modern, have agreed that the owner of the land thus bounded is entitled to these additions. By some, the rule has been vindicated in the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion; by others, it is derived from the principle of public policy, that it is the interest of the community that all land should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore itself.'

"* * * We are therefore of opinion that the patent of June 15, 1855, which described the land conveyed as lot 4, according to the official plat of the survey, of which a copy is annexed to the bill, marked 'Exhibit A', conveyed to the patentee the title to all accretion which had been formed up to that date.

"The case of Jones v. Johnston, 59 U. S. 18 How. 150 (15:320), is cited by the defendant as holding that a grantee can acquire, by way of appurtenance, land outside of such description. But that case holds that *a water line, which is a shifting line and may gradually and imperceptibly change, is just as fixed a boundary in the eye of the law as a permanent object,* such as a street or a wall; and it justifies the view announced by the circuit court in its opinion, that *where a water line is the boundary of a given lot, that line, no matter how it shifts remains the boundary,* and a deed describing the lot by number or name conveys the land up to such shifting line exactly as it does up to a fixed side line. See also Lamb v. Ricketts, 11 Ohio, 311; Giraud v. Hughes, 1 Gill & J. 249; Kraut v. Crawford, 18 Iowa 549.

"These views result in the conclusion that the side lines of Lot 4 are to be extended to the river, not as the river ran at the time of the survey in 1851, but as it ran at the date of the patent in 1855, and that all the land which existed at the latter date, between the side lines so extended and between the line of the lot on the south and the river on the north, was conveyed by the patent."

The western boundary of Plaintiffs' original lots, as to the area in controversy, was, at the time of the patents thereto from the Government, the center of the Mississippi River. This boundary gradually over the years shifted westerly, enlarging the east-west area of Plaintiffs' ownership; but the Court of Appeals has deprived Plaintiffs of their boundary on the Mississippi River and granted same to Defendant. Was this correct?

The Court will find a consistency and continuity in all of the decisions of the Supreme Court of Mississippi on the subject of riparian rights and ownerships. From the earliest times, in our humble opinion, great learning has been exercised by the Courts of Mississippi on this subject.

For the purposes of the decisions of the Supreme Court of Mississippi, tracking the common law, the Mississippi River has been considered and held to be a "non-navigable stream", as confined to that portion above the ebb and flow of the tides. Owners of lands in our State bordering the Mississippi, as shown by the Government Land Office Surveys, have always been considered as having riparian rights thereon, including actual ownership of the bed of the stream (subject to rights of navigation thereover) to the westernmost State line. This Honorable Court in the *Archer* case *supra,* so judicially concluded. As there pointed out by this Honorable Court, the decisions establishing the above announced rules are *Morgan & Harrison v. Reading,* 3 Smedes & Marshall 366, and *Steamboat Magnolia v. Marshall,* 39 Miss. 109. The *Morgan & Harrison v. Reading* case, *supra,* discusses all treaties leading up to the admission of Mississippi as a State in 1817. The lengthy opinions in both cases are learned and historically most interesting.

It is not the technical law of accretions, as applied in some jurisdictions, but the law of property—ownership from the center of the earth to the skies above—that here governs. This contention is not novel in Mississippi. The

theory which we urge as controlling is that which has been uniformly applied to settle almost every "accretion case" in Mississippi. Based thereon the Court of Appeals stated that the District Court correctly announced the general law of Mississippi in concluding:

> "The alluvion deposited on the bed so owned by plaintiffs was the property of the plaintiffs as owners of their part of the bed though under water, and the fact that it appeared above water attached to defendant's land *did not make it defendant's land.*"

Note the following Mississippi adjudications relied upon by the District Judge in confirming title to Plaintiffs as to that portion of their ownership which was originally riparian to the Mississippi River, to which ownership record title in Plaintiffs was stipulated (R. 25):

1. *Smith v. Leavenworth,* (1911), 57 So. 803, 101 Miss. 238:

> "* * * This alluvion became the property of the owners of the mainland, *constituted a part of each section to which it formed,* and is included in the assessment and deed describing the land by its sectional number. *Jefferson v. East Omaha Land Co.,* 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 878; *Towell v. Etter,* 69 Ark. 34, 63 S. W. 53; *Crill v. Hudson,* 71 Ark. 390, 74 S. W. 299.
>
> *"The fact that the alluvion began forming north of section 24 and opposite the land of appellant is immaterial. When it reached appellee's shore line in its southward progress, he became entitled to his portion thereof."*

Therefore, it is observed that where the alluvion commenced, to what land it first physically attached, "IS IMMATERIAL". When the alluvion later reached the adjoining property owners' sphere of ownership, it became his—not because it was an accretion, in the technical and usual aspect upon which decisions of some other courts depend, but because it was then on and over the lands of such adjoining owner, and then, as above noted, "constituted a part of *each* section to which it formed"—and not simply an addition to the section where it originated or first attached.

2. *Archer v. Southern Railway Co.*, (1917) 114 Miss. 403, 75 So. 251. (This case and that of *St. Louis v. Rutz* we shall also discuss post).

> "The island which formed in front of complainant's land, it is agreed, belonged to the owner of the land lying east of the river. The defendant does not challenge complainant's title of the island immediately in front of complainant; but, when complainant seeks to establish ownership *beyond the northern limit* of her *SHORE LINE*, defendants demur. It is pointed out that if complainant is right, when the nucleus of the island formed in front of her land, she would own the island if it should thereafter extend up and down the river along the entire river front of Washington County, and even more.
>
> "The general rule is stated to be, when an island is so formed in the bed of the river as to divide the channel and to lie partly on each side of the thread of the stream, if the land on opposite sides of the river belongs to different owners, the island is divided between them to the thread or medium line between

the banks of the river. Gould on Waters, section 166.

"It seems to be pretty well settled that, where an island forms opposite lands on one side of the stream and extends across the stream, the proprietor on the opposite side of the stream takes that part which forms on his side of the stream.

"*Mulry v. Norton, et al.*, 100 N. W. 437, 3 N. E. 586, 53 Am. Rep. 206, stated the rule thus:

> "'*However such accretions may be commenced or continued, the right of one owner of uplands to follow and appropriate them ceases when the formation passes laterally the line of his coterminous neighbor.*'

"This expression by the New York court strikes us as sound in principle and draws the line rationally and in accordance with common justice. *If the owner can claim the island in question after it has passed the line of his neighbor on the north, many complications as to riparian rights would inevitably arise; and if this is the iron-clad rule his ownership may extend over county lines no matter what may be the vagaries of the river.*

"As we have said before, there is a singular absence of authority on the precise question involved in this case. Much learning has been displayed by our own court, in the early cases, upon the subject of accretions and riparian rights; but we have searched in vain for a case just like the present case. The industry and ability of counsel has not produced a case in point, and so far as we know we are blazing the way in this decision. There must be some limit of the ownership of islands formed offshore in non-navigable rivers, and, *when we fix the limit at the*

line of the coterminous owner, we feel that we are not out of line with the authorities, and safe within the boundaries of the general principles of convenience, justice, and common rights of property."

From the *Archer v. Railway Co.* case we find, in language most apt, that it makes not one whit of difference how "such accretions may be commenced or continued"; and that the right of the owner of uplands "to follow and appropriate them (the accretions) CEASES when the formation passes LATERALLY the line of his coterminous neighbor"—viz, when the accretions, no matter where or how they commenced or affixed themselves to the freehold, get off of, beyond the lines of ownership (necessarily determined by Government Land Office Surveys) of the property to which the formation originally adhered and into the realm of ownership of another and adjacent owner of uplands. What could be clearer or more applicable!

3. *Wineman et al v. Withers*, (1926) 143 Mass. 537, 108 So. 708:

"When one of the boundaries of land is a river that is non-navigable within the meaning of the common law, as is the case here, *the center or thread of the stream, and not the water's edge, is the boundary, and the title of the owner of the upland embraces also the land under the water to the middle or thread of the stream.* Morgan v. Reading and The Magnolia v. Marshall, supra. *The title* of the owner of such land *to alluvion, and to the new bed* of the river formed by the encroachment of the river on the upland by erosion, is not wholly dependent, if at all, on

the law of accretion, *but is controlled in the case of alluvion by the fact that it was formed over land that, although under water, was his,* and in the case of encroachment of the river by reason of erosion by the fact that he owned the land before the encroachment of the river thereon. *The center or thread of the stream in either event continues to be his water boundary, and he continues to own all of the land, either above or under the water, that lies between that boundary and the opposite upland boundary established by the calls of his deed.* When the river encroached on the land of the appellees, *they continued to own the land under the river bed, and, when the alluvion formed thereon, it, of course, also became his for the reason that it formed over his land.* 3 Farnham on Waters, Sec. 848; City of St. Louis v. Rutz, 138 U. S. 226, 11 S. Ct. 337, 34 L. Ed. 941. To the same effect is the rule governing the title to land which becomes submerged, but afterwards reappears, although the boundary of the original tract is the water's edge. Ocean City Association v. Shriver, 64 N. J. Law, 550, 46 A. 690, 51 L. R. A. 425; Mulry v. Norton, 100 N. Y. 426, 3 N. E. 581, 53 Am. Rep. 206."

The announcements of law in the *Wineman* case leave naught to imagination. It is here decisive. "Title", and consequently ownership of riparian lands, is controlled in Mississippi by the fact that the alluvion in controversy "formed over land that, although under water, was his (Plaintiffs)"; and that the "center or thread of the stream in either event *continues* to be (Plaintiffs') water boundary, and he (Plaintiffs) *continues* to own all of the land, either above or under the water, that lies between *that*

boundary and the opposite upland boundary established by the call of his (Plaintiffs') deed".

4. *Cox v. Phillips*, 277 Fed. 414 (a Fifth Circuit decision interpreting the laws of Mississippi):

> "It appears to be the settled law of Mississippi that the owner of land bounded by the Mississippi river takes title to the middle thread of the river. Morgan v. Reading, 3 Smedes & M. 366; The Steamboat Magnolia v. Marshall, 39 Miss. 109; Archer v. Greenville Sand & Gravel Co., 233 U. S. 60, 34 Sup. Ct. 567, 58 L. Ed. 850. In Jeffris v. East Omaha Land Co., 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 872, it is said:
>
> " 'Where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary, and a deed describing the lot by number or name conveys the land up to such shifting water line, exactly as it does up to a fixed side line."
>
> "To the same effect is Smith v. Leavenworth, 101 Miss. 238, 57 South. 803.
>
> "If, therefore, there had been no reference to accretions or made land, the title thereto would nevertheless have passed by the deed of trust and the foreclosure thereof, to the island and to all the alluvial lands lying between the Buena Vista plantation and the middle thread of the Mississippi river. But the fact that the alluvial lands are specifically mentioned would appear to show beyond dispute that title thereto passed, by foreclosure of the deed of trust, to the predecessor in title of defendant in error."

5. *Paepcke, et al., v. Kirkman, et al.*, 55 Fed. (2d) 814 (also a Fifth Circuit decision on Mississippi law):

> "As the land lies in Mississippi, the law of that state as to title must govern. *The title to land formed by accretion is in the owner of the abutting shore.* Archer v. Southern Ry. Co., 114 Miss. 403, 75 So. 251; Richardson v. Sims, 118 Miss. 728, 80 So. 4. Consequently, the title to the land here involved is in appellees unless it has been divested by adverse possession."

Plaintiffs' lots, as to the part riparian to the Mississippi River, continued ALWAYS to have the thread, thalweg or center of that stream (it being immaterial which it may be denominated) as their western terminus and boundary. The calls of Plaintiffs' Deeds, and that of their predecessors, derived from Government Land Office Surveys as sections riparian to the Mississippi River—and thus it was, and is, that "title" ought to be fixed and determined.

We respectfully submit that the foregoing adjudications, enunciating the rules of property in Mississippi as to riparian ownership of lands therein fronting on the Mississippi River above the ebb and flow of the tide, sustain the conclusions and the result reached by the learned District Judge and substantiate the summary herein made of the settled rules of property which it is submitted must be applied and regarded toward properly solving and settling the rights and riparian ownership of the litigants.

4. THE DECISION OF THE COURT OF APPEALS.

The learned opinion of the Court of Appeals points out the absence of any case in Mississippi affecting accretions

between the fork of two streams. The opinion then frankly, by footnote, disavows, as applicable, the reasoning and basis for the decisions in *Archer v. Southern Railway Co.*, 114 Miss. 403, 75 So. 251, and *Smith v. Leavenworth*, 101 Miss. 238, 57 So. 803, both cited and quoted from *supra*.

Finding an absence of any decisions from Mississippi, and citing none from any other jurisdictions, the Court of Appeals embarked, for determination of the litigants' ownership, on an unchartered theory which resulted to substitute the boundary, or center, of the Yazoo River for the boundary, or center, of the Mississippi River, to which latter line Plaintiffs' ownership was initially assured and fixed.

Rules of property and the ownership of property must be settled and certain for the public welfare and to assure, in this great constitutional democracy, protection and security to both private and public owners of lands. Singularly, and we submit correctly, the learned District Judge was spontaneously moved to comment: * * * "The law of the case is easy enough"; and that "The law in Mississippi is well settled as to the rights of landowners having lands bounded by the Mississippi River" (R. 176).

While the Court of Appeals recognizes that Plaintiffs' riparian ownership (as to the area involved) was bounded westwardly by the Mississippi River and that therefore this boundary was the center or thalweg of that stream, the Court of Appeals concludes that, because the accretions over this ownership and within the confines of Plain-

tiffs' property resulted in a prolongation of the Yazoo River across and within Plaintiffs' lands, a curtailment of title and change and transfer of ownership must result. Plaintiffs' riparian ownership was blessed with additions, accretions and not erosions. But the anomalous result of the standing decision is that the additions curtailed the ownership on which they appear, and that Defendant owning the property to the north is automatically endowed therewith.

The Court of Appeals states that: "The Mississippi thalweg remained the westerly boundary of all the lands that still reach it", etc. Plaintiffs actually possessed title to this westerly boundary, ownership of the bed of the Mississippi River to the shifting thalweg therein opposite their lots. How can it be contended that Plaintiffs' lands do not reach the State line, the thalweg of the Mississippi River, when that thalweg was and is the true western boundary of Plaintiffs' ownership?

The Court of Appeals denied the applicability of the case of *Archer v. Southern Railway Co.*, 114 Miss. 403, quoted from *supra*, pages 24 and 26. If the *Archer* case is not followed, then Defendant's ownership could have extended downstream and taken in and usurped for miles the riparian rights and properties of hundreds of owners, public and private, on the Mississippi River. But the Supreme Court of Mississippi in the *Archer* case fixed the ownership between lateral lines and the limit at the line of the coterminous owner, feeling that such rule of law was "safe within the boundaries of the general principles

of convenience, justice, *and the common rights of property".*

The lands here involved are dry lands above water within the lateral lines of Plaintiffs' ownership of uplands. What difference does it make whether an island or not! Every reason prompting the decision and every principle announced in the *Archer* case is here applicable.

Also, note the decision of this Honorable Court in *St. Louis v. Rutz,* 138 U. S. 226, 34 L. Ed. 941, 11 S. Ct. 337. This case discusses the holdings of Illinois which, as to riparian rights, are similar to the Mississippi adjudications, and this case was approvingly cited, *Wineman v. Withers, supra.* Incidentally, this Honorable Court there cited with approval the case of *Mulry v. Norton,* 100 N. Y. 424, 1 Cent. Rep. 748, which decision was likewise considered as controlling authority in the *Archer* case. Random, applicable quotations from the case of *St. Louis v. Rutz* follow:

> "The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to A RULE OF PROPERTY, which is governed by the local law of Illinois. Barney v. Keokuk, 94 U. S. 324, 338 (24: 224, 228); St. Louis v. Myers, 113 U. S. 566 (28:1131); Packer v. Bird, 137 U. S. 661 (34:819). In Barney v. Keokuk it is said that if the States 'choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections'.

"The Supreme Court of Illinois has established and steadily maintained, AS A RULE OF PROPERTY, that the fee of the riparian owner of lands in Illinois bordering on the Mississippi River extends to the middle line of the main channel of that river. (Citing authorities.)

"* * * It is laid down by all the authorities that, if an island *or dry land* forms upon that part of the bed of a river which is owned in fee by the riparian proprietor, the same is the property of such riparian proprietor. *He retains the title to the land previously owned by him with the new deposits thereon.*

"It may be asked, pertinently, what has become of the riparian rights of the plaintiff on the river, if his title to the land in dispute is not sustained? * * * The plaintiff was a riparian proprietor on the river. If his title to the land in question is not sustained, he is no longer such riparian proprietor (on the Mississippi River) and is cut off from the access to the river. *Among his rights as a riparian owner are access to the navigable part of the river from the front of his land; and the right to make a landing, wharf or pier for his own use or the use of the public.* Dutton v. Strong, 66 U. S. 1 Black, 23 (17:29); St. Paul & P. R. Co. v. Schurmeier, 74 U. S. 7 Wall. 272 (19:47); Yates v. Milwaukee, 77 U. S. 10 Wall. 497, 504 (19: 984, 986).

"No act has been done, or negligence committed, by the plaintiff or his grantor which occasioned any loss of the land or any transfer of the title to it, either to the State of Illinois or to the City of St. Louis."

Here, it can be successfully submitted that neither Plaintiffs nor their predecessors have done or committed any act which entitled the Defendant to their property and their riparian rights on the Mississippi River. Continuing, the Supreme Court of the United States in the case of *St. Louis v. Rutz* said:

> "* * * When land was formed again on the place where the plaintiff's land had been washed away, it became the property of the plaintiff, and, although the land thus newly formed extended a short distance into the old bed of the river beyond the former shore line, such additional formation belonged to the plaintiff *as a deposit on that part of the bed of the river which was owned by him in fee*, and not to the State of Illinois or to any third party. Otherwise, the plaintiff would be cut off without his fault from the river front and from his riparian rights. * * * The fact that more land has thus been restored to the plaintiff than was cut away cannot deprive him of his riparian right or of his access to the river. The State of Illinois does not claim any part of such land, but concedes to the riparian proprietor the bed of the river where the land formed. * * * It was formed upon that part of the bed of the river which was owned in fee by Blumenthal and the plaintiff, and continued in such ownership after it became dry land.
>
> "* * * The title to land acquired by accretion *is a title acquired under the operation of the law of the State, which each State determines for itself.* Barney v. Keokuk, 94 U. S. 324 (24: 224).
>
> "As the law of Illinois confers upon the owner of land in that State which is bounded by, or fronts on,

the Mississippi River, *the title in fee to the bed of the river to the middle thereof, or so far as the boundary of the State extends, such riparian owner is entitled to all islands in the river which are formed on the bed of the river east of the middle of its width.* That being so, it is impossible for the owner of an island which is situated on the west side of the middle of the river, and in the State of Missouri, to extend his ownership, by mere accretion, to land situated in the State of Illinois, the title in fee to which is vested by the law of Illinois in the riparian owner of the land in that State. * * * and if the plaintiff thereby has lost such newly formed land and been deprived of access to the river in front of his surveys, then all the riparian proprietors down the river, as far as the bars have formed or may form hereafter in front of their land, must lose their titles and surrender them to the City of St. Louis, as a part of Arsenal Island. * * * Whenever it occurred, whether when the sediment first commenced to form a deposit on that part of the bed of the river, or whether when it formed a bar which, though still submerged, could be discerned by soundings, or whether when it came so near to the surface that its extent could be discerned by navigators, or whether when it arose above the surface and became dry land, there must have been, in order to maintain the contention of the defendant, an instantaneous transfer of a quarter of a mile of land from the plaintiff to the City of St. Louis, at one and the same moment of time. Such a transfer was not a title by accretion, within the meaning of the law on that subject."

The above excerpts are quoted for the Court's convenience, with the entire case being commended for review.

It is noted that this Honorable Court there used the language "an island OR DRY LAND" interchangeably—and why not under the similar "rule of property" governing in both Illinois and Mississippi!

In substituting the intervening Yazoo River as the boundary dividing the ownership of the litigants, and in thereby depriving Plaintiffs of title to the thalweg of the Mississippi River, it is, with respect, suggested that the Court of Appeals did not accord controlling or due regard to the following principles implicit in the afore-cited rules of decision of Mississippi: (a) Owners of lots fronting on the Mississippi River must extend their original ownership laterally to the thread, or thalweg, of that stream. The opinion rendered denies that right to Plaintiffs and conversely permits Defendant not only to extend its original ownership laterally but vertically, lengthwise and perpendicularly. (b) The manner in which the accretion commenced or continued is immaterial, the criterion being that when these accretions appeared on and over the lands of Plaintiffs, though originally under water, they belonged to Plaintiffs as did likewise the entire bed of the intervening Yazoo River as to the area thereof between Plaintiffs' original Sections 2 and 3, fronting on the Mississippi River, to the thalweg of the Mississippi River, the State line there constituting the western terminus of Plaintiffs' ownership. (c) The appearance of a channel within the limits of the calls of ownership should not limit that ownership, the overall and original boundary being extant. As to the area in controversy, the thalweg of the Yazoo River never marked or constituted the boundary of

Plaintiffs' lands as patented from the Government. The thalweg of the Mississippi River was the western boundary, and the thalweg of the Mississippi River is still and has always been opposite Plaintiffs' lands as an existing boundary, an original, fixed and continuing boundary.

5. FUNDAMENTAL RULES OF PROPERTY SHOULD PREVAIL.

It is elementary that property must always be subject to definite ownership. A property owner on the Mississippi shore of the Mississippi River is either a riparian owner on the Mississippi River, entitled to ownership to the State line, or he is not a riparian owner on the Mississippi River. That is axiomatic. It assuredly is not the law that today the upland owner is riparian to the State line and tomorrow he is not; but the reasoning and law applied in the prevailing opinion would have that undesired result.

The point is that both decisions below found Plaintiffs, as to the area in controversy (their southerly lots), were through their predecessors riparian proprietors on the Mississippi River blessed with actual title to the bed of that River to the State line. The standing decision now deprives Plaintiffs of that boundary on the State line and affirmatively results to transfer that boundary and ownership thereon to Defendant.

The governing law as we have shown, and we now quote *Thompson on Real Property*, Volume 3, Section 2445, page 556, is:

> "The riparian right to future alluvion is a vested right. *It is an inherent and essential attribute of the ORIGINAL PROPERTY.* The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase."

Owning to, and having as the western terminus of Plaintiffs' riparian ownership on the Mississippi River, the State line was as it is an integral part of Plaintiffs' title as well as a valuable property right. Therefore, notwithstanding the voluminous record and the multiple exhibits, we submit the issues are principally to be determined on the basis of the Government Land Office Surveys as applied to the laws of Mississippi. The Supreme Court of Mississippi in the case of *Lawrence v. Byrnes*, 193 So. 622, 188 Miss. 127, certainly held that rights of private litigants are to be determined from their patents, necessarily based on Government Land Office Surveys. We quote an applicable announcement of law from the Lawrence case:

> "The primary question in the case is this: Where was the channel of this stream located in 1821? The burden was upon appellants as complainants in the trial court to make this proof, but appellants were unable to make it. When the patentees obtained their patents from the government, *their rights became vested and fixed as of that date and could not be affected by any subsequent survey* or corrected sur-

> vey by the government. 50 C. J., pp. 913, 914. The plat of 1847-1848 formed no basis for the determination of the proprietary rights between the owners of the two sections mentioned, for if the stream in 1821 was located at a different point as compared with that shown on the plat of 1847-1848, the latter had no effect whatever on the title."

The Government owned to and conveyed to the State line, as to the area in controversy, which was patented to Plaintiffs' predecessors. That *fixed* the State line as the western terminus. That title has not been lost by Plaintiffs or gained or acquired, by appropriation or otherwise, by the Defendant.

Simply because the accretions over and on the bed of the Mississippi owned by Plaintiffs caused a prolongation of the Yazoo River within the boundaries of Plaintiffs' title did not change the boundary. Had an island east of the State line been formed opposite Plaintiffs' shore line, then Plaintiffs virtually admittedly would have owned the bed of the channel between their shore line and the island, would have owned the island, as to the portion thereof opposite their shore, and would have also continued to own, west of the island, to the State line. The Yazoo, as extended, as to the portion wholly within the overall boundaries of the Plaintiffs (between their shore line on the Mississippi River and the State line), was but a channel, to be likened to any navigable channel which may have formed on the east side of an island opposite and east of the State line, which line formed, and continued to be, the fixed western boundary of

Plaintiffs' riparian lands on the Mississippi River. See *Thompson on Real Property*, Volume 4, Section 3233, page 345.

VI. CONCLUSION.

Frequently this Honorable Court, through certiorari, has dealt with and settled riparian property rights within the several States. These decisions, delineating and enforcing the proper rules of property, have been salutary and through the years have most frequently served to settle and to fix with certainty ownership by the most humble citizen and the sovereign alike.

The questions here are important. Rules of property and of ownership are involved. The right to any oil, gas and minerals covered by the area forming the bed of the Mississippi River, as well as to the alluvion and timbers thereon, is in controversy.

The decisions rendered below and the authorities cited demonstrate, we respectfully submit, impelling reasons to prompt this Honorable Court to accept, review and determine this controversy. Though mindful of the weighty national problems and far reaching world-wide decisions with which this Court is daily confronted, we beseech this Honorable Court's consideration and determination of this cause.

Toward the accomplishment of simple justice under law, Plaintiffs so pray.

Respectfully submitted,

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This is to certify that copies of this brief have been served on opposing counsel on this the ..... day of June, 1948.

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